IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY,
Plaintiff in Error,

v.

THE STATE OF INDIANA, EX REL. WILLIAM A. KETCHAM, ATTORNEY-GENERAL,
Defendant in Error.

Case No. 18,903.
Term No. 264.

MOTION TO DISMISS OR AFFIRM.

The said defendant in error comes by his counsel appearing in that behalf and moves the court to dismiss the writ of error in the above entitled cause for want of jurisdiction, because the judgment from which said writ of error purports to have been taken and is being prosecuted is the judgment of the Supreme Court of one of the United States, to-wit.: the Supreme Court of the State of Indiana, and that in and by the record of said cause it appears that

there is no federal question and no question cognizable or examinable by this Honorable Court upon a writ of error to said Supreme Court, made, shown or presented by said record.

And the said defendant in error by counsel as aforesaid also moves the court to affirm the said judgment from which the said writ of error purports to have been taken and is being prosecuted, because although the record in the said cause may show that this Honorable Court has jurisdiction in the premises, yet it is manifest that the said writ of error was taken and is being prosecuted for delay only.

WILLIAM A. KETCHAM,
Special Counsel for the State of Indiana.

ROSCOE O. HAWKINS,
ROBERT S. TAYLOR,
FERDINAND WINTER,
Of Counsel.

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NOTICE OF SUBMISSION OF MOTION TO DISMISS OR AFFIRM.

To Messrs. Samuel O. Pickens, John G. Williams and Lawrence Maxwell, Jr., Attorneys for Plaintiff in Error:

Please take notice that on Monday, the 28th day of March, 1904, at the opening of the court, or as soon thereafter as counsel can be heard, the motion to dismiss or affirm, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with the said motion in support thereof.

WILLIAM A. KETCHAM,
Special Counsel for the State of Indiana.

ROSCOE O. HAWKINS,
ROBERT S. TAYLOR,
FERDINAND WINTER,
Of Counsel.

We hereby acknowledge service of the above and foregoing notice and acknowledge that we have received from the Defendant in Error copies of the motion to dismiss or affirm the Writ of Error in the above cause, together with the brief in support thereof of the Defendant in Error, this 5th day of March, 1904.

SAMUEL O. PICKENS,
JNO. G. WILLIAMS,
LAWRENCE MAXWELL, JR.,
W.,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States

ERROR TO THE SUPREME COURT OF INDIANA.

Case No. 18,903.
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Plaintiff in Error,

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THE STATE OF INDIANA, EX REL. WILLIAM A. KETCHAM, ATTORNEY-GENERAL,
Defendant in Error.

Brief upon the motion to dismiss on behalf of the Defendant in Error

The case before the court is a writ of error to the Supreme Court of Indiana in a cause in which the State of Indiana, ex rel. William A. Ketcham, Attorney-General, is plaintiff and the Terre Haute & Indianapolis Railroad Company is defendant. The suit was brought in the Superior Court of Marion County. The judgment of the court was for the plaintiff. [The opinion of that

court is in the record at page 93 to 104.] The defendant appealed to the Supreme Court, where the judgment of the Superior Court was affirmed, 159 Ind. 438. The opinion of that court is in the record at page 652 to 681. From that judgment the plaintiff in error prosecutes this writ of error. The defendant in error moves the court to dismiss the writ upon the ground that no federal question is presented by the record. The intelligible presentation of the motion will require a brief resume of the case, its subject matter and the proceedings had in it in the State courts.

By an act approved January 26, 1847, the General Assembly of the State of Indiana granted a charter of incorporation to a railroad company under the name of "The President and Directors of the Terre Haute & Richmond Railroad Company." By a subsequent act the name of the corporation was changed to "Terre Haute & Indianapolis Railroad Company," by which name it still exists and was sued in this case. In 1873 the company accepted the provisions of the general railroad law of the State. The incorporating act is set out in full in the record as an exhibit to the complaint at page 15. The only part of it necessary to be considered in this discussion is sections 22, 23, and 24, which are as follows:

> "22. The corporation may charge and receive such tolls and freights for the transportation of persons, commodities and carriages on said road, or any part thereof, as shall be for the interest of said company, and to change, lower, or raise at pleasure: *Provided*, That the rates established

from time to time shall be posted in some conspicuous place or places on said road.

"23. That when the aggregate amount of dividends declared shall amount to the full sum invested and ten per centum per annum thereon, the Legislature may so regulate the tolls and freights that not more than fifteen per centum per annum shall be divided on the capital employed, and the surplus profits, if any, after paying the expenses and receiving such proportion as may be necessary for future contingencies, shall be paid over to the Treasurer of State, for the use of common schools, but the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen per centum per annum can not be made; and it shall be the duty of the corporation to furnish the Legislature, if required, with a correct statement of the amount of expenditures and the amount of profits after deducting all expenses; which statement shall be made under the oath of the officer whose duty it shall be to make the same.

"24. Semiannual dividends of so much of the profits as the corporation may deem expedient shall be made on the first Monday in December and July, annually, unless the directors fix on a different day, and pay the stockholders as soon thereafter as they can with convenience, and no dividends shall be made to a greater amount than the net profits after deducting all expenses; and the directors may retain such proportion of the profits as a contingent fund to meet subsequent expenses as they shall deem proper."

The theory of the statute on which the suit was based was that under these provisions it was the duty of the railroad company to distribute its net earnings, less a reasonable reservation for contingencies, among its stockholders as dividends until such dividends amounted in the aggregate to the full sum invested by them and 10 per centum per annum thereon; that up to that time there was no limitation upon the rates which might be charged or upon the dividends which might be declared; that after that time the dividends could not exceed 15 per centum, and the surplus profits belonged to the State whether the Legislature exercised its right to regulate charges or omitted to do so. The State never did in fact exercise that power. It was the view of the plaintiff that its omission to prescribe rates was an adoption of those in force by the act of the company. It was charged in the complaint that the company had in fact earned and received as net profits large sums of money in excess of the full sum invested and 10 per centum per annum thereon, and in excess of dividends at 15 per centum after that reimbursement was complete; that it had concealed that fact and manipulated its stock and accounts in such manner as to make it appear in the reports given out to the public and otherwise that the time had not arrived when the dividends had amounted to the full sum invested and 10 per centum per annum thereon. The complaint sought an accounting covering all the business and transactions of the company from its organization until 1873. It asked that the account should be taken from the beginning in

the manner required by the act so as to give the State the benefit of whatever surplus profits had been made and would have been payable to the State if the terms of the law had been complied with from year to year as time passed by. This view of the rights of the State was sustained by the Superior Court and an accounting was had upon these principles, resulting in a finding and judgment for the State in the sum of $913,905.01.

The plaintiff's right to recover depended wholly upon the construction of the statute. As to this, a few questions were decisive. A cursory reference to the more important of them will show what the issues before the court were.

The first in logical order and in importance was whether or no under Section 23, the State must exercise its power to regulate tolls and freights before it could become entitled to surplus profits after payment of 15 per cent. dividends to the stockholders. As the State never exercised that power, a decision of that question in the affirmative would have put an end to the plaintiff's claim at once. But it was held by both the Superior Court and the Supreme Court that the right of the State to surplus profits did not depend on its previous exercise of the power to regulate. The discussion of this question occupies a large space in the opinion of the Supreme Court—from page 656 to 662 in the record in this court.

Perhaps the next most important question related to the meaning of the words "the full sum invested." The plaintiff stood upon the ground that they meant the

amount invested in the construction and equipment of the road by the stockholders; while the defendant claimed that they meant the full sum spent, from whatever source derived. The upholding of the defendant's contention on this point would have defeated the plaintiff's claim. The question is stated as follows in the opinion of the Supreme Court, on page 662 of the record here:

> "A spirited controversy prevails upon what is meant by 'the full sum invested' and 'capital employed' as used in §23. The State's insistence is that the term embraces only such sums as were contributed directly by those who purchased the corporation stock for the construction of the road, and the sum paid for bonds that were issued and used for construction, and subsequently converted, under their provisions, into shares of stock,—amounting in the aggregate to $1,216,690. On the other hand, appellant insists that the term means the full *cost* of the construction and equipment of the road,—whether contributed directly by the stockholders or taken from the earnings of the road, —amounting in the aggregate to $1,988,150. If the State's contention is right, there was received and appropriated by appellant, in excess of the amounts to which it was entitled under its charter, a large sum of money, and if appellant's contention is right, it received no more money than it was entitled to retain."

These questions were both decided in favor of the plaintiff, and that determination of them settled the case in the plaintiff's favor. The remainder was mere computation.

The Superior Court made the computation for itself and stated it in the opinion, year by year, from 1847 to 1873. It will be found on pages 101, 102 and 103 of the printed record in this court. This computation was discussed by the Supreme Court, and a restatement of the figures made on page 680-1 of the record, showing that the finding of the Superior Court might have been for a larger sum under the evidence.

Of course, in such an accounting a great many questions would arise in relation to details. There was quite a field of controversy as to stock which had been issued but which had to be excluded from the computation under the rule adopted by the court; also over the distinction which is often so difficult to make in such accountings between construction and maintenance, and many others of similar character. The filing of the Master's report was followed by thirty-eight exceptions by the plaintiff and eleven exceptions by the defendant. They occupy the printed record in this court from page 109 to page 133. Of those taken by the defendant nine were overruled and two were sustained. Of those taken by the plaintiff twenty-five were sustained and thirteen overruled.

It is not material to the subject before the court on this motion to go into the merits of any of these questions. Enough has been said to indicate the nature and scope of the controversy. The sole object of the suit was to enforce an obligation created by a statute of Indiana. The sole matters in the controversy were the construction of the statute, the effect of a former judgment in the Court of Indi-

ana, and questions incidental to the accounting. The defendant attempted to interpose certain defenses under the Constitution of the United States. But they were all of such nature as to be entirely unavailing if the construction which the court placed on the act of 1847 was the correct one. If the interpretation of that law set forth in the opinion of the Supreme Court is sound, the railroad company owed an obligation to the State to account for surplus profits which had never been discharged. If the principles upon which the account was made up in the final judgment were correct the right result was reached without color of violation of any provision of the Federal Constitution. That this is the true state of the case we shall endeavor to show more specifically in the discussion of the errors assigned, to which, after this preliminary general view of the case, we now proceed.

THE ERRORS ASSIGNED.

The first of the errors assigned is as follows:

> "1. That each of the following statutes of the State of Indiana is repugnant to section 10 of article 1 of the Constitution of the United States, and to article 5 and to section 1 of article 14 of the amendments to said Constitution, to wit:
>
> "The act approved January 27, 1897, p. 8. The act approved February 18, 1897, p. 38. The act approved February 24, 1897, p. 59. The act approved March 4, 1897, p. 145."

This is not an assignment of any error in the proceedings of any court. It is a mere attack on the Legislature of Indiana. It presents no question for the consideration of this court. But as other assignments of error to be discussed later rest on the alleged unconstitutionality of these laws, or some of them, it will be as convenient as otherwise to refer to them now with some general comments upon the questions which arise regarding them. And as it will be necessary for the court to read them at some time in the consideration of the case it will abridge the labor of that duty to set them out here in order and in full.

The first act named is that of January 27, 1897, which is as follows:

> "Whereas, By section twenty-three (23) of an act of the General Assembly of the State of Indiana, entitled 'An act to incorporate the Terre Haute & Richmond Railroad Company,' approved

January 26, 1847, it is provided among other things, that the surplus profits of said road in certain contingencies shall be paid over to the Treasurer of the State for the use of the common schools, and that it shall be the duty of said corporation to furnish the Legislature, if required, with a correct statement of the amount of expenditures and the amount of profits after deducting all expenses; which statement shall be made under the oath of the officer whose duty it shall be to make the same; and

"Whereas, It has been made known to this General Assembly that a large amount of money is due to the State of Indiana for the use of the common schools under this section, but the particular amount thereof is not known, and it is necessary that such statement shall be made in order that this General Assembly may be advised of what legislation is needed in order to enforce the rights of the State; and

"Whereas, The books and papers of said railroad company are now in the possession of the Terre Haute & Indianapolis Railroad Company; now therefore,

"Section 1. *Be it enacted by the General Assembly of the State of Indiana,* That the Terre Haute & Richmond Railroad Company and the Terre Haute and Indianapolis Railroad Company be and they are hereby required to make and file with the Attorney-General of this State for the use of the General Assembly, on or before the 6th day of February, 1897, a statement under the oath of the President and Secretary of said roads showing:

"1. The amount of expenditures in the construction and operation of said roads from the 26th day of January, 1847, to the 17th day of January, 1873, inclusive.

"2. The total amount of receipts during the corresponding period.

"3. The total amount of profits in the operation of said roads during said period.

"4. The detail of the expenditures:

"a. In the construction of said road.

"b. In the operation thereof during the corresponding period.

5. What disposition has been made of the profits:

"a. By way of dividends declared and paid from time to time.

"b. By way of reinvestments or other disposition.

"Sec. 2. The Attorney-General of the State do immediately upon the passage of this bill cause notice thereof to be served upon the President or Secretary or some member of the Board of Directors of the said Terre Haute & Richmond Railroad Company and the Terre Haute & Indianapolis Railroad Company, by personal notice if such officers or directors or either of them can be found within the State of Indiana, and in the event that neither or any of them can be found within the State of Indiana, by publication in a daily newspaper of general circulation printed and published in the cities of Indianapolis and Terre Haute, by three consecutive publications, and demand of said companies the making and furnishing of said statement.

> "Sec. 3. Immediately following the 6th day of February, 1897, or sooner in the event such statement is filed with him, the Attorney-General shall report to this General Assembly such statement, and in the event such statement is not filed with him, to report that fact, together with the steps that have been taken by him to notify said companies of the passage of this law."

This act simply calls upon the railroad company to account, and directs the Attorney-General to serve the notice and report the result to the Legislature. It does not direct nor authorize the taking of any of the company's property nor have any imaginable tendency to impair the obligation of any contract unless it shall be contended that the acceptance by the company of the provisions of the general law created a contract on the part of the State that it would never call on the company for an account under its charter. We are not willing to impute to counsel such a fanciful and far-fetched contention and prefer to rest in the belief that this act is not open to any constitutional objection which the plaintiff in error has pointed out or can claim in this case.

The second act named is that of February 18, 1897, which is as follows:

> "Section 1. *Be it enacted by the General Assembly of the State of Indiana*, That section thirty-six of the above entitled Act be amended to read as follows:
>
> "Section 36. All existing railroad companies may acquire all the powers or benefits conferred by

this act, by filing an acceptance thereof in the office of the Secretary of State, properly attested as the corporate act of such company, and the acceptance of any part of this act shall be deemed and taken to be an acceptance of the whole act, and thereupon such company shall possess such powers, so accepted, and be subject to the obligations and restrictions herein specified, as fully as they would have had and been if organized under this act: *Provided, however,* That whenever any railroad organized under any special charter granted by the State of Indiana, shall hereafter accept or shall have heretofore accepted the provisions of the general railroad law as embodied in said act, approved May 11, 1852, all rights and liabilities, whether inchoate or complete, in favor of the State of Indiana, shall be and they are hereby expressly reserved to said State notwithstanding such acceptance, and said State may hereafter, by appropriate legislation, make such provision for the determination and enforcement of said rights as the General Assembly may deem appropriate, and notwithstanding such acceptance any and all provisions of said charter may be amended, repealed or added to as though said charter was in full force and effect, and as though said railroad company or companies had not accepted the provisions of said act of May 11, 1852."

The section amended by this act was part of the general railroad law of Indiana, being section 3932 of the Revised Statutes of 1881, and is as follows:

"Any existing railroad company may acquire all of the powers or benefits conferred by this act, by

> filing an acceptance thereof in the office of the Secretary of State, properly attested as the corporate act of such company. The acceptance of any part of this act shall be deemed and taken to be an acceptance of the whole act and a surrender of the act under which such company may be organized; and, thereupon, such company shall possess such powers so accepted, and be subject to the obligations and restrictions herein specified, as fully as it would have had and been if organized under this act."

The amendment makes two changes in the original law. It omits the words "and a surrender of the act under which such company may be organized;" and it adds the proviso. Neither of these changes seem to us to affect the law in any respect material to this case. The acceptance of the provisions of a general law by a corporation organized under a special law means necessarily an acceptance of those provisions in lieu of the provisions of the special law. It would be a surrender of all rights, powers and privileges not conferred by the general law. It would put the corporation on equal footing with like corporations organized under the general law. It might affect an existing contract between the corporation and the State as to the future. It did have that effect in this case. It excused the railroad company from future payment of surplus revenue. But it did not and could not extinguish accrued and existing liability from the corporation to the State. All this would be equally true whether the acceptance of the general law be called a surrender of the special

charter or not. The corporation could not pay its debts in that way. The same remarks apply to the proviso. It was not necessary to add that reservation in order to preserve the vested rights of the State against a company accepting the general law. The amendments made by this act were both *ex industria*. But they were not without some justification in a former judgment of the Superior Court of Marion County, to which reference will be made later.

The third act named is that of February 24, 1897, which is as follows:

> "Section 1. *Be it enacted by the General Assembly of the State of Indiana*. That section twenty-three (23) of the above entitled act be amended to read as follows:
>
> "Section 23. That when the aggregate amount of dividends declared or earned received in excess of the operating expenses of said road shall amount or shall have amounted to the full sum invested in the construction of said road with ten per cent. interest per annum thereon, the General Assembly may so regulate the tolls and freights that not more than fifteen per centum per annum upon the amount invested in the construction of said road shall be divided on the capital so invested in such construction, but the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen per centum per annum upon the actual capital that has been invested in said road shall not be made; and it shall be the duty of the corporation to furnish the General Assembly, from time to time, whenever required, with correct

statements of the amount of its expenditures, not only in the construction of said road, but also in the operation thereof, and the amount of profits after deducting all operating expenses, which statements shall be made under the oath of the officer, or officers, whose duty it shall be to make the same; and at all times after the aggregate of the dividends declared shall amount, or shall have amounted to the sum used in the construction of said road and ten per centum per annum thereon, the surplus profits after reserving for division, or after making dividends at the rate of fifteen per centum per annum, and after reserving such reasonable proportion as may be necessary to provide for future contingencies shall be semiannually, on the first Monday in July and December of each year, paid over to the Treasurer of State for the use of common schools. And the General Assembly may, from time to time, as it may deem expedient, take such steps as it may deem necessary to compel said railroad company to comply with the provisions of this section, as herein amended, and to account for and pay over said moneys and said excess of profits to said Treasurer of State for the use of said schools, and whenever said General Assembly shall require an accounting from said railroad company such accounting shall cover the entire period covered by the operation of said road from its acceptance of its charter up to and including the period when said railroad company may have accepted the provisions of the general railroad law of the State. And the right of the State upon any such inquiry or upon any suit that may be authorized to compel such accounting shall be the same as though this amend-

ment had been originally a part of the charter of said railroad, and as though a suit to enforce such accounting had been prosecuted prior to the acceptance by said railroad company of the general railroad law of the State: *Provided, however,* That nothing in this act contained shall be in anywise construed as lessening, impairing or releasing in any manner any right of or any liability to the State of Indiana by reason of anything contained in said original charter; all of which rights and liabilities are expressly reserved to said State as fully as though this section had not been amended."

The section amended by this act is the main foundation on which this suit rests. If the effect of the amendment was to vary the contract between the railroad company and the State which was embodied in the original section, so as to put a greater burden upon the company, it was, of course, to that extent void. But that was not its intention nor its effect. It was intended as a legislative construction of the act amended; and to express truly the meaning and the true construction of the law, as originally enacted. If this is so, the act is not open to any constitutional objection. But it is not necessary to decide this question. It may be conceded that this act was unconstitutional without exposing the judgment of the Supreme Court of Indiana to the criticisms made by the plaintiff in error, as will fully appear later.

The fourth act referred to is that of March 4, 1897, and is as follows:

"Whereas, On the 26th day of January, 1847, the General Assembly of the State of Indiana

granted a special charter to the President and Directors of the Terre Haute and Richmond Railroad Company, for the purpose of constructing and operating a railroad commencing at some point on the western line of the State of Indiana and running eastwardly through Terre Haute, Greencastle and Indianapolis to the city of Richmond; and,

"Whereas, Said railroad was constructed from a certain point on the western line of Indiana, eastwardly through Terre Haute, Greencastle to Indianapolis, under the privileges granted by said charter; and,

"Whereas, By the terms of an act approved March 6th, 1865, the name of said company was changed to that of the Terre Haute & Indianapolis Railroad Company, and by said act all the contracts, obligations and liabilities theretofore existing under the name of the President and Directors of the Terre Haute & Richmond Railroad Company were continued in full force, notwithstanding the change in the corporate name; and

"Whereas, By the terms and conditions of such charter, said corporation, among other things, was required to pay to the Treasurer of the State of Indiana, for the use of its common schools, certain of its surplus profits; and,

"Whereas, By the terms and conditions of said charter, it became and was the duty of said company to make and keep complete records of the expense of building and repairing said roads, and each section thereto, together with its incidental expenses, and also an account of the tolls and earnings thereof; and,

"Whereas, No sufficient or satisfactory statement or report has been made by said corporation or its successors to the General Assembly, or to any officer of the State, of the amount of expenditures or earnings, or of the amount of profits after deducting the expenses, or of the conduct of its business, so as to inform the General Assembly upon that subject, notwithstanding a demand therefor has been duly made upon said company and its successors, under the authority and by the direction of the General Assembly; and,

"Whereas, No moneys have ever been paid by said company to the Treasurer of State for the use of the common schools of the State, and it is believed and represented to the General Assembly that there is now and has for a long time been due to the Treasurer of State, for the use of said common schools, a large sum of money by reason of the excess of earnings over expenses under the terms and provisions of said charter as it originally existed, and as it has been subsequently amended, but it is not possible, except by judicial proceedings, to ascertain and determine the exact amount thereof; now, therefore,

"Section 1. *Be it enacted by the General Assembly of the State of Indiana*, That all the surplus profits arising from the operation of, and which were received by the Terre Haute & Richmond Railroad Company and the Terre Haute & Indianapolis Railroad Company from and after the date when said corporation had earned and received profits in its business from which it could and should, as in duty bound under this act, have de-

cared dividends equal in the aggregate to the amount of the full sum invested and ten per centum per annum thereon, in excess of fifteen per centum per annum on the capital employed, after paying the expenses of operation and reserving such proportion as was necessary for future contingencies, be and the same are hereby declared to be due and payable to the Treasurer of State for the use of common schools, and are hereby appropriated for that purpose.

"Section 2. That the Terre Haute & Indianapolis Railroad Company, its officers, agents, employes and persons in possession thereof, without reference to the method or manner of their appointment or possession, are hereby required to forthwith account to the Attorney-General of the State for the amounts due and owing to the Treasurer of State for the use of common schools, by reason of the excess of its receipts over and above its expenditures as provided and required by its charter and by the amendments thereto, and upon such accounting to pay over to said Attorney-General, for said Treasurer of State, for the use of the common schools as aforesaid, the amounts so found due upon such accounting, being the total receipts by said railroad company up to and including the 17th day of January, 1873, from the period when the receipts arising from the operation of said road shall have equalled the amount invested in the construction of said road, together with interest thereon at the rate of ten per centum per annum, in excess of fifteen per centum per annum upon the capital used in the construction of said road.

"Sec. 3. Said Attorney-General shall, immediately upon the passage of this act, make a demand upon said company, its officers, and any receiver in possession thereof under the order of any court, for such accounting and for the payment of the money due upon such accounting, under said charter and under any amendment or amendments thereto, to the Treasurer of State, for the use of common schools.

"Sec. 4. In the event said railroad company shall fail to promptly comply with said demand and to make such accounting and to pay over said moneys to said Attorney-General, it shall be the duty of the Attorney-General to take such steps and proceedings in any court of competent jurisdiction, having jurisdiction of the subject matter thereof, to compel such accounting and the payment by said railroad company, or the receiver thereof under the appointment of any court, of the moneys so due to the Treasurer of State for said common schools, under said charter or any amendments thereto, and for the purpose of enabling said Attorney-General to comply with this act, he is hereby authorized and empowered to employ such additional legal counsel as in his judgment is necessary, to assist him therein, and he and his assistants are further authorized to select and employ one or more expert accountants, and one stenographer to assist them in the performance of such duties.

"Sec. 5. The Governor, Secretary of State and Auditor of State are hereby constituted a Board for the purpose of auditing and authorizing the payment of the expenses arising in the performance

of the duties hereby imposed upon the Attorney-General and his assistants, and said Board shall, upon the recommendation of the Attorney-General, from time to time, allow to the assistants so employed, the accountants and the stenographer, such sums as in the opinion of the Board shall be justly due for the services rendered, and also all the expenses actually incurred; and thereupon the Auditor of State shall draw his warrant for such sums upon the Treasurer of State, and the same shall be paid out of any funds not otherwise appropriated. But the amounts to be paid to the said additional counsel or other persons so employed shall be determined by the Board of Audit hereinafter provided for.

"Sec. 6. In event the railroad shall, in connection with the proceedings herein authorized, be directed to be sold by the decree of any court, and it shall be necessary in the opinion of the Attorney-General and his assistants to protect the interests of the State by bidding at such sale, they shall so recommend in writing to said Board, and thereupon said Board shall determine what amount should be bid in order to protect the interests of the State, and shall advise him of the limit beyond which he shall not bid, and upon such sale, said Attorney-General shall, in the name and for the use of the State, bid for said property according to his judgment, and not exceeding the amounts authorized by said Board, and in the event of a sale to the State, the Auditor of State shall draw his warrant upon the Treasurer of State for such sum, which shall be paid out of any sum in the Treasury not otherwise appropriated, and upon the confirma-

tion of said sale, the Governor, with the concurrence and consent of the remaining members of said Board, shall designate and appoint the proper officers to take charge of and operate said property, or said Board may, in its discretion, lease the same until provision shall be made by the General Assembly for the disposition of said property.

"Sec. 7. The Attorney-General shall retain out of the moneys collected a commission of ten (10) per cent., and shall pay to the assistants so employed by him commissions not exceeding in the aggregate fifteen per cent., said commissions to be apportioned by the Attorney-General between said assistants in his discretion, and the residue of said moneys so collected shall by said Attorney-General be paid over to the Treasurer of State for the use of common schools, except as to the amounts that have heretofore been paid out by the authority of said Auditing Board on account of the expenses of the litigation, which said sums shall be repaid to the general fund, and the residue only paid over for the use of (the) common schools: Provided, however, That no sums other than his actual expenses incurred during the litigation shall be paid to the Attorney-General, except as he shall collect from said railroad company, or its receiver, an amount for the use of common schools, and in the payment of such commission to the assistants, credit shall be given to the State for any sums that may have been theretofore paid to them or either of them in any manner on the allowances made from time to time by said Board. *And, provided further*, That in the event any litigation that may be instituted to enforce such liability, shall not be

> fully and finally determined and the moneys collected and paid over before the expiration of the term of office of said Attorney-General, he shall continue in said employment as special counsel for the State until said litigation has been fully and finally determined, and the moneys collected and paid over, notwithstanding his term of office may have expired and his right, power and compensation shall be continued as though he were still acting as such Attorney-General, and as though said litigation had been completed during his term of office, but no auditing Board shall be authorized to make any allowances or payments to him other than his actual expenses as aforesaid."

The sole object of this act was to authorize and direct the bringing of this suit. It does not operate nor profess to operate to take the property of the plaintiff in error for public use or any other use or without due process of law. It proceeds upon the assumption that the railroad company was owing the State of Indiana a debt which it was refusing to pay, and it makes the necessary provision for the bringing of suit to collect the same.

The provisions of the Constitution which, it is said, in the first assignment of error, are violated by this legislation are the following:

Art. I, Sec. 10, which prohibits the passage by any State of any law impairing the obligation of any contract.

Art. V of the amendments, which prohibits the deprivation of any person of property without due process of law, and also prohibits the taking of private property for public use without just compensation.

Art. XIV of the amendments, Sec. 1, which forbids any State to deprive any person of property without due process of law, or deny to any person the equal protection of the laws.

This assignment of error alleges that each one of the foregoing statutes is repugnant to all of the foregoing provisions of the Constitution, which is absurd, even as a political charge against the Legislature. We shall see as we proceed that the other assignments are only a little less vague. So much for the first assignment of error.

The second assignment of error is stated in six subdivisions designated by letters. We will consider them separately. Error 2a is as follows:

> "In overruling the defendant's demurrer to the complaint, in so far as the demurrer is based on the Constitution of the United States."

This demurrer is found at page 36 of the printed record. It states first the statutory ground that the complaint does not state facts sufficient to constitute a cause of action against the defendant; and in support of that allegation charges that the complaint seeks to take from the defendant property in which it has a vested right, and to accomplish that result invokes the aid of the laws enacted in 1897, which laws are in violation of the provisions of the Constitution before referred to.

There is no such thing known in the Indiana practice as a special demurrer. This pleading contains the language necessary to make a good general demurrer; and the other averments combined with that make it neither

better nor worse. The question presented by it was whether there was matter in the complaint, which, if true, would authorize the relief prayed for, or some part of it. That much being found, more would do no harm. If the act of 1847 created an obligation against the railroad company for the payment of surplus profits, and if the facts averred in the complaint were sufficient to show that such profits had been received by the company and that it had refused, on proper and authorized demand, to account for them, and that the action was not barred by a former judgment recited in the complaint, that was enough to require the court to overrule the demurrer. It was not necessary to consider the constitutionality of the acts of February 18 and February 24, 1897.

The court took this view on both points. The opinion of the Superior Court overruling the demurrer is in the record at page 37. It discusses at length the question of the construction of the act of 1847 and sustains the contention of the plaintiff in that respect. The cause of action which it finds in the complaint is rested wholly on the act of 1847.

In respect to the legislation of 1897 the court remarked in the opinion as follows, on page 42 of the record in this court:

> "In construing the provisions of the defendant's charter, so far we have given no consideration to the legislation enacted in 1897, for the reason that in so far as it attempts, if it does so attempt, to add or to change the liabilities or obligations of the defendant, whether by express provision, in-

terpretation, or retroactive operation, it is in violation of the Constitution, and therefore invalid.

"In so far, however, as such legislation provides a remedy for enforcing an existing obligation, or confers upon any officer authority to do any act or thing in the furtherance of existing rights, it is valid and binding."

This ruling of the Superior Court was affirmed by the Supreme Court with an express statement that the cause of action well stated in the complaint, was one resting on the law of 1847. The following is from the opinion:

"The State's action is based upon the obligations assumed by appellant in the acceptance of its original charter of 1847, or it has no case. This, in effect, is conceded by the State's counsel. An effort of the General Assembly by amendatory legislation in 1897, to create in the State a right in the earnings of appellant where none existed before, or to impose upon appellant any new charter liability, or obligation, would be so clearly unconstitutional as to leave no ground for argument. We are, therefore, inclined to dismiss the first contention with the observation that in so far as either of the acts of 1897, *supra*, attempts, if either does so attempt, to increase the liabilities, or to impose any new burden upon, or in any way change the obligations of appellant, the same is invalid, and the respective rights and liabilities of the parties must now be determined by their contractual relations entered into in 1847, in the same way as if the legislation of 1897 had never been enacted. However, as we read the complaint and understand

> the theory of the State, the late legislation is appealed to only as providing a remedy for enforcing the pre-existing charter obligations of appellant, and to this extent it is valid. *Cincinnati, etc., Co. v. Clifford*, 113 Ind. 460-466; *Webb v. Moore*, 25 Ind. 4; *Hopkins v. Jones*, 22 Ind. 310-315.
>
> "We pass then the legislation of 1897 as being out of the case, except as conferring certain powers upon the Attorney-General and as defining the procedure, whereby the claims asserted by the State, as arising under the original charter, may be fully and fairly contested with appellant."

If the Superior and Supreme Courts of Indiana had the right to construe the act of 1847, and if, when read as construed by them, that act imposes upon the defendant the obligation and liability charged in the complaint, then their decision raised no federal question. In order to develop a federal question in the record this court must first review the decision of the Supreme Court of Indiana as respects the construction of the Indiana statute of 1847, and find that it was erroneous, and then find that nothing remains to support the complaint except the acts of 1897, and that those acts were unconstitutional; and that, therefore, the plaintiff in error was denied the protection of the Federal Constitution by the Indiana court.

This can not be done. The construction of the act of 1847 does not involve any federal question. Whether "the full sum invested" means the full sum invested by the stockholders, or the full sum spent of money derived

from any source is not a federal question. Whether the obligation of the company to account for surplus profits depended upon an exercise by the State of its power to regulate tolls and freights, or not, is not a federal question. If the judgment of the Supreme Court of Indiana upon the construction of an Indiana statute is not subject to review by this court, then this court can not in this case disregard that part of the decision of the Supreme Court of Indiana upon which its decree rested in order to find in the record a federal question which the Indiana court did not profess to decide and did not decide.

The demurrer also contains this statement:

> "And in support of this demurrer defendant shows to the court, as one of the many imperfections of said complaint, that it seeks to take from this defendant property in which it has vested rights by virtue of its original charter and the amendments thereof, and by virtue of the judgment of this honorable court in the complaint set forth."

The sole object of the suit was to require the railroad company to submit to an accounting and to pay such sum as might be found due. The theory of the demurrer seems to be that a debtor has a vested interest in his liabilities, and to compel him to extinguish them is an invasion of his constitutional rights. It would be a happy day for some of us that would see that doctrine established.

The complaint did not seek to disturb the defendant in its title to or possession of its property, unless that result

should follow a decree rendered in the case establishing an indebtedness from the railroad company to the State. As against that result the company was entitled to interpose every defense which it had. It is quite absurd to say that a complaint of that sort seeks to deprive a defendant of his vested rights.

The reference to the judgment set forth in the complaint requires this explanation. Some years prior to the beginning of the present suit the State brought suit in the same court against the same defendant for a liability alleged to exist under the same law, in which suit there was judgment for the defendant upon a demurrer to the complaint. The complaint in this case recited the facts of the former suit and judgment with reasons why, as was claimed, that judgment was not a bar to the present suit. The sufficiency of the facts alleged to avoid the force of the former judgment was one of the questions presented by the demurrer. Unless they were sufficient in legal effect to show that judgment to be not a bar to the present action the complaint contained no cause of action. If they were the defendant had no vested right established by that judgment to be disturbed.

In overruling the demurrer to the complaint the court decided that under the law of 1847 a liability had accrued against the defendant, and that the former judgment had not extinguished that liability, if the facts stated in regard to it were true. If that decision was correct in point of law it infringed no vested right of the defendant.

Error 2b is as follows:

"In sustaining plaintiff's demurrer to the second paragraph of the answer setting up a defense under the Constitution of the United States."

The paragraph of answer referred to is found at page 45 of the record. The following is a summary of its allegations:

That by act of January 20, 1851, the company was relieved from the duty of building that part of its road lying between Indianapolis and Richmond;

That it afterward built and has continued to operate that much of the line authorized by its charter lying between Indianapolis and the Illinois State line, and no more;

That the company accepted the provisions of the general law in 1873;

That the Legislature of Indiana passed and the Governor approved the acts heretofore mentioned of January 27, February 18, February 24 and March 4, 1897;

That by the prosecution of this action the State is seeking to take the defendant's property for public use without compensation, and destroy vested rights and deprive defendant of its property without due process of law in violation of the same constitutional provisions before referred to.

This paragraph professes to answer the whole complaint. If, under the provisions of the act of 1847, the company had become indebted to the State, its acceptance of the general law would not extinguish the indebtedness; neither would that indebtedness be affected by the legislation

of 1897. The legal question to be decided in passing on the sufficiency of the answer was exactly the same question already decided in passing on the demurrer to the complaint. It was a question depending on the construction of the act of 1847. If the true meaning of that law was such that upon the facts stated in the complaint the company had become liable to the State for surplus profits under the obligations imposed by the law, then the facts stated in the answer were not sufficient to negative that liability. This was the view taken by the court. It did not hold that the acts of 1897 were constitutional. The view which it took of the act of 1847 made it unnecessary to decide that question in order to pass on the demurrer. As before, this court can not find any federal question in this part of the record without first creating one by reviewing and overruling the decision of the Supreme Court of Indiana in respect to its construction of the act of 1847, and thus leaving the State's cause of action to rest alone on Section 23 as amended by the act of February 24, 1897. We need not repeat the arguments already offered to show that that can not be done.

Error 2c is as follows:

> "c. In sustaining the plaintiff's demurrer to the eleventh paragraph of the answer setting up a defense under the Constitution of the United States."

The paragraph of answer here referred to is found in the record at page 58. The following is a summary of its averments:

That prior to 1872 the State of Indiana filed an information against the defendant company seeking a for-

feiture of its charter because of the same acts set forth in the complaint in this case;

That said action came to trial before a jury, but resulted in a disagreement;

That the State abandoned said action and brought suit in the Superior Court of Marion County in 1875 to recover money alleged to be due under the terms of the defendant's charter, and setting forth as the basis of its claims the same acts alleged in the complaint in this case;

That in that case a demurrer was sustained to the complaint and judgment for the defendant rendered thereon; which judgment was affirmed by the Supreme Court of Indiana;

That from that time until the bringing of this action the State of Indiana acquiesced in said judgment;

That in 1887 a majority of the stock of defendant company was sold for full value to purchasers without notice of any claim on the part of the State;

That again in 1893 a controlling interest in the said company's stock was sold for full value to purchasers in good faith without notice;

That relying on the acquiescence of the State in said judgment the defendant company had so extended its business and incurred obligations that it would be irreparably injured by being compelled to account for and pay over the profits claimed by the State;

That the State of Indiana, knowing all these things, by an act passed in 1897, authorized the Governor to buy the defendant's property at judicial sale;

That notwithstanding all these facts the State of Indiana is seeking in this action to destroy the defendant company's vested rights, take its property for public use without compensation and without due process of law in violation of the same provisions of the Constitution before mentioned;

That the persons who managed the affairs of the defendant company for the first twenty years of its existence died before the commencement of this action, and also others who managed its affairs from 1867 to 1877; so that the defendant is unable properly to defend against the alleged wrongs set out in the complaint;

That ever since the affirmance of the former judgment by the Supreme Court the State of Indiana permitted the defendant company to deal with its railroad and property without attempting to impeach the said judgment.

This plea may be characterized as a combination of laches and estoppel. It denies no allegation of the complaint and, therefore, admits them all; and so admits that the State once had a right to recover the profits sued for in the complaint. It invokes the protection of the Constitution of the United States, but it does not appear explicitly whether this is as an independent defense or in support of the defense of laches and estoppel. If the former, it must be considered as though the matter found in the next paragraph to the last on page 60 of the record, stood alone as a full defense to the action. It is evident that such a defense could not be a good one, whether the acts referred to were constitutional or not, and its dis-

allowance by the State court can not be assigned as error here. It would be a mere assertion of a right as a conclusion of law.

If the reference to the Constitution be taken as in aid of the other averments of the answer, it amounts only to this; that if the other defenses set out in the answer are valid in law and true in fact it will be a violation of the constitutional guarantees referred to to disallow them. It can not be a violation of those guarantees to disallow a proffered defense which is either insufficient in law or untrue in fact.

But how was it to be ascertained whether the defenses of laches and estoppel are valid in law and true in fact, or not? Had the court a right to consider and decide that question notwithstanding the threat in the belly of the answer that a writ of error would be taken if the defenses were not sustained?

It did do it. This is what was said on the subject by the Supreme Court:

> "The fourth answer in general terms, and the eleventh, specially, plead knowledge, acquiescence, and laches on the part of the State in bar of the action. The argument in support of these answers is that the contract by which the State had a right to participate in the profits of appellant was an ordinary business contract, outside the domain of sovereignty and in making the contract the State submitted itself to the same laws that govern individuals. We are unable to accept this argument. A sovereign, as such, has a right to name the conditions upon which it will grant another the right

to exercise a public power; and to require the payment of money, in a contingency, that may arise, as a means of preserving equality among those exercising like franchises, and to prevent excessive profits, is not an abdication of sovereignty, or an entrance into the domain of commerce within the meaning of the cases cited by appellant.

"Appellant is a *quasi* public corporation. Its charter was a matter of public record, equally open to all. The nature and basis of the State's claim was accessible to all dealers in its stocks and bonds. The action in *quo warranto* in Owen County, in 1874, and the suit in the Marion Superior Court in 1875, were public proceedings, and the legal effect of the orders and judgments was equally known to all. That there has been much procrastination is beyond dispute, but a wise public policy has long since forged the rule, now everywhere adhered to, that the State shall not be made to suffer from the delays, or negligence of its public officers. *United States* v. *Kirkpatrick*, 22 U. S. 720, 735; *Crane* v. *Reeder*, 25 Mich. 303, 320; *Farish* v. *Coon*, 40 Cal. 33, 50; *State* v. *Beviers*, 86 N. C. 588, 592; *Wallace* v. *Maxwell*, 10 Tredell (N. C.) 110, 112; *Gibbons* v. *United States*, 8 Wall. 269; *People* v. *Brown*, 67 Ill. 435.

"'It is a familiar doctrine,' says the court in the last cited case, 'that the State is not embraced within the statute of limitations, unless specially named, and by analogy, would not fall within the doctrine of estoppel. Its rights, revenues, and property would be at fearful hazard, should this doctrine (estoppel) be applicable to the State. A great and overshadowing public policy of preserv-

> ing these rights, revenues, and property from injury and loss by the negligence of public officers forbids the application of the doctrine. * * * The doctrine is well settled that no laches can be imputed to the Government, and by the same reasoning which excuses it from laches, and on the same grounds, it should not be affected by the negligence, or even wilfulness of any one of its officials.' "

This question is one of the dignity, immunities and rights of the State; a question of administration of her own law in her own courts. If the State of Indiana has any sovereignty at all it would seem that she ought to have the right to declare her own policy on such a subject matter as against her own citizens. Would it be within the power of Congress to enact that in all suits between the State and the citizens the State should be responsible for the laches and estoppel by the acts and omissions of her officials? Would a contrary provision in a State Constitution be a violation of the Constitution of the United States?

Error 2d is as follows:

> "d. In overruling the defense set up in the third paragraph of the answer setting up a defense under the Constitution of the United States."

The paragraph of answer here referred to is found at page 47 of the record. The reply thereto is at page 52. A demurrer to the reply was filed (page 57) and overruled (Id. 58). The court found the facts to be as stated in the reply. It was only in this way and sense that the court "overruled the defense set up in the third paragraph."

The matter set up in the third paragraph of answer was the same former suit and judgment referred to in the paragraph last above mentioned, but stated with greater particularity of detail.

The reply alleged, among other things, that said former suit was instituted without authority, and without any previous demand on the part of the State, and that the judgment of affirmance by the Supreme Court was not on the merits, but in consequence of a defective record. The questions arising upon this defense are discussed in the opinion of the Supreme Court on pages 665 to 672. We quote the following from that part of the opinion:

> "There was something more in this case than a simple obligation and promise to pay money. As a condition precedent to any duty to pay or account for money received, certain collateral things were to be done that could be accomplished only by the co-operation of both parties to the contract. The railroad was to be built, money must be earned, expenses paid, repairs and ordinary improvements made, the sums contributed by the builders for the construction and equipment must be restored, a sufficient sum to meet future contingencies reserved, and a fifteen per cent. current dividend provided. All the money the company should receive in the operation of its road from the beginning should be its property,—much or little. The right of the State at no time attached to any part of the earnings until after the company had paid its operating expenses, refunded the investment, set apart a sum for future contingencies, and provided a fifteen per cent. dividend on its proper

capitalization. When these things were all done, if surplus profits remained, the duty of the company then arose to pay such surplus, as a surplus to the Treasurer of State. But how was it to be known when these things were accomplished, and when liability to the State arose without some basis or rule established, or agreed to by the parties for making the estimate? Will it be seriously contended that the General Assembly conferred upon the corporation power to arbitrarily settle for itself and for the State, what should constitute the 'full sum invested?' What operating expenses, and what a reasonable sum for future contingencies? If it did, in the doing of it, it must have known that it was sheer folly to provide for the payment of a surplus to the State. To hold that it was given over to the company conclusively to resolve as against the State after the road was put in operation, that all betterments, extensions, and extraordinary improvements paid for from the earnings, and bonded indebtedness incurred for construction, but paid from the profits, and divers other items, that represented not a dollar used in the construction of the road, may be, at the pleasure of the company, capitalized, counted, and refunded, as a part of the 'full sum invested' within the meaning of Section 23, is equivalent to holding that it was the legislative intent to place it wholly within the power of the corporation to defeat the State's right, by avoiding the accumulation of a surplus. * * *

"It is clear that the Legislature never intended that the corporation should have its own way with respect to what should constitute 'the full sum in-

vested,' what proper operating expenses, and other fit matters of accounting; for the right to require an accounting which implies the right to have it made on a fair and just basis, is expressly reserved. And while these grounds of settlement remained unadjusted, and in controversy, and the initiative rested upon the State, and the question of whether the company owed the school fund, remained problematical, and depended solely upon the rules that should prevail in the settlement, no duty rested upon the corporation to pay any sum to the Treasurer of State, and no right of action rested in the State for the recovery of money, with, or without a demand. The duty to account when required, as imposed by Sec. 23, means nothing more nor less, than the duty to settle and pay over to the Treasurer of State, any surplus disclosed, when requested or demanded by the Legislature to do so. * * *

"We therefore conclude that no suit for money would properly lie against appellant without an accounting and disclosure of something due; that no duty was imposed upon appellant to make an accounting until requested by the General Assembly. This request was not made until 1897, and no actionable default by appellant had occurred prior to that date."

The court also found that upon the facts stated in the complaint in the former case as to the capital invested, earnings received, and dividends paid, it appeared on the face of the complaint that nothing was due to the State under the terms of the charter, and that the complaint was for that reason also, bad on demurrer. The discussion

of this point in the opinion is on pages 669 to 671 of the record of this court.

Upon these facts the court found, as matter of law, that the judgment against the State in the former case was upon a complaint which contained no cause of action, and that it was therefore no bar to a subsequent suit. No federal question appears in any part of the discussion. None can be injected into this part of the record without first reviewing and reversing the judgment of the Supreme Court upon the sufficiency of the defense pleaded as one of former adjudication.

Error 2e is as follows:

> "e. In holding the defendant liable to the State of Indiana, notwithstanding the surrender of its charter in 1873, and the former judgment of the Superior Court of Marion County, Indiana, adjudging that the defendant was not liable to the State of Indiana."

This assignment presents the same defense of former adjudication referred to in the last preceding assignment, in combination with the acceptance of the general law by the company, after the manner of a patent claim. If it has any novelty over the other assignments of error, it must be on the ground that, although the former judgment was not of itself *res adjudicata*, it had that effect because the company had previously accepted the general law. It does not appear to us that these two things can be supposed to have any connection as defenses unless on the same ground of estoppel which was set up in the 11th

paragraph of the answer and is discussed above, under assignment of error 2c.

Error 2f is as follows:

> "In giving effect to the said acts of the Legislature passed in 1897, hereinbefore mentioned."

As appears from what has been said, the Supreme Court did not give effect to any of those acts except the first one in date to the extent of holding that the demand authorized and directed by it was a necessary prerequisite to the maintenance of the suit; and the last one in date to the extent of holding that the express authority and direction given by it to the Attorney-General to begin the suit was also proper and necessary.

As was pointed out by the Supreme Court in the paragraph just quoted from the opinion, the duty imposed upon the company by its charter was, first, to do certain things; to build the road, or some part of it, to divide its net earnings as dividends, etc., and in a contingency which might, or might not arise, to pay its surplus profits to the Treasurer of State for the use of common schools; and second, "to furnish the Legislature, if required, with a correct statement of the amount of expenditure and the amount of profits after deducting all expenses;" that is to say, to account when called upon by the Legislature. This power in the Legislature to call for an accounting was not lost by delay in exercising it. It was never exercised until the passage of the act of January 27, 1897. Its exercise by the passage of that act was not the creation of any new

liability against the railroad company. It was the exercise of a right on the part of one of the contracting parties expressly contemplated and provided for in the original contract. That provision was precisely like the stipulation in a patent license that the licensee shall keep an account of sales and that the licensor shall be entitled to call for an accounting and to examine the books. It would have been within the line of the fair discharge of duty on the part of the railroad company to render its own account voluntarily to the Legislature at every session. But the charter did not in terms require such reports. It would have been equally within its right for the Legislature to call for a report and an accounting at every session. If it had done so there would have been no ground to claim that it was putting any burden on the company not within the terms of the original contract. The long neglect to exercise that right gives it no new legal character when it is finally acted upon. It was when required by the Legislature, and by no other department of the State government, that the company was legally bound to account. The law might as well have named the Governor as the State officer to require the accounting. If it had done so would there have been any ground to claim that the act of the Governor in calling for an account was an invasion of vested rights, or a taking of property for public use without compensation, or without due process of law, or anything else unconstitutional? No more was the same act by the Legislature. But the Legislature can act only by law or joint resolution. Hence the necessity and the right to enact the law of January 27, 1897.

As to the act of March 4, 1897, still less need be said. There was nothing in it except a direction to the Attorney-General to bring this suit together with reasonable and suitable directions in regard to its prosecution and the collection of the judgment, if one should be obtained.

We have already quoted from the opinion of the Supreme Court of Indiana the statement that if the Legislature of 1897 operated to change the obligation of the company as fixed by the law of 1847, it was to that extent void; but that so far as it only provided a remedy for enforcing the pre-existing charter obligations of the company it was valid. In support of that statement three prior decisions of its own were cited by the court, which distinctly sustain the proposition. But as this is a question concerning the application of a provision of the Constitution of the United States we suppose these decisions are not conclusive of the question here. The rule, however, does not rest on the decisions of the Supreme Court of Indiana. It is the general rule of the law.

Judge Cooley, in his work on Constitutional Limitations, says, at page 286:

> "Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract; and it does not impair it, provided it leaves the parties a substantial remedy, according to the course of justice as it is exercised at the time the contract was made.
>
> "It has accordingly been held that laws changing remedies for the enforcement of legal contracts

will be valid, notwithstanding the new remedy is less convenient than the old, or less prompt and speedy."

In the note he cites numerous cases from Federal and State court decisions, adding the following from the opinion of Chief Justice Marshall in *Sturges* v. *Crowninshield*, 4 Wheaton 122:

> "Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct."

"No one," says Mr. Justice Story, "will doubt that the Legislature may vary the nature and extent of remedies, so always that some substantive remedy be in fact left." Story's Con., Fifth Ed., Section 1385.

Penniman's Case, 103 U. S. 714 (720).
Fourth National Bank v. *Francklyn*, 120 U. S. 747 (755).
South Carolina v. *Gaillard*, 101 U. S. 433.
Antoni v. *Greenhow*, 107 U. S. 769.
Memphis v. *United States*, 97 U. S. 293.
Tennessee v. *Sneed*, 96 U. S. 69.
Railroad Co. v. *Hecht*, 95 U. S. 168.
Terry v. *Anderson*, 95 U. S. 628 (633).

This case is one which, as we see it, does not really need the application of this principle, because, as we have elsewhere stated, the remedy provided by the Legislature of 1897, is only that clearly contemplated by the law of 1847. Section 23 clearly imports that the State shall take the very steps authorized by the Legislature of 1897. If

these were not so, the right of the Legislature to provide by subsequent legislation any suitable and fair remedy is fully supported by the authorities which we have cited.

The real objection to the legislation of 1897 considered with respect to the remedy afforded for the enforcement of the rights conferred by the legislation of 1847 was not so much that the remedy afforded by the legislation of 1897 impaired or tended to impair the obligation of the contract of 1847 but rather that the remedy afforded was too successfully enforced.

The third assignment of error is as follows:

> "3. That the said acts of the Legislature of Indiana and the judgment and proceedings in this case deprive the defendant of its property without due process of law, and deny to it the equal protection of the laws in contravention of the Constitution of the United States."

This assignment presents no question not presented over and over in the preceding assignments except the charge that the acts of the Legislature and the proceedings of the plaintiff in the case deny to the defendant the equal protection of the laws. Well; courts are provided in order that suits may be brought. From the filing of the complaint in this case to the handing down of the opinion of the Supreme Court the defendant had every opportunity known to the law to show that the plaintiff's claim was unfounded. All the machinery of the law was at its service to enable it to defend itself against wrong. What more does the "equal protection of the laws" require?

It is imaginable that it may be argued that by the acceptance of the general law by the railroad company it acquired a vested right to be let alone by the State, which the Constitution would protect. But, if that should be claimed, the same principle will apply. Whether the acceptance of the general law relieved the company from any obligation to account which the law of 1847 imposed upon it; whether it acquired by that act any vested right to property; whether the State was bound by the laches or estopped by the acts or omissions of its officials, were all alike questions to be tried. The company was duly summoned into court for the trial of them. They were not federal questions. They were regularly tried by courts having full jurisdiction of the company and the subject matter. The final judgment rendered upon them by the Supreme Court is not subject to review here.

It is manifest that these assignments of error present some very vague and shadowy grounds of complaint against the proceedings of the Indiana courts—mere charges, we submit, without color of foundation. It will be an economy of time to point out first, the particular claims of the plaintiff in error to which we believe this remark justly applies, and which ought therefore to receive no further consideration by the court.

If we turn from assignment 2a to that part of the record on which it rests, and to which we have particularly referred in the discussion of that assignment, we find that it was claimed that the State was seeking by its suit to take from the defendant property in which it had vested rights

under its orignal charter and by virtue of the former judgment in the case. The same claim underlies in part assignments 2b, 2c, and 2d.

The whole object of the suit was to compel payment of an alleged indebtedness. It did not seek to disturb the company's possession of or title to its property in any other way or for any other purpose. While the sale of a man's property on execution puts an end to his vested rights in it, it is a kind of invasion of that right which the constitution does not forbid.

In those parts of the record on which assignments 2b, 2c and 2d are in part founded it was charged that the State was seeking to take the property of the defendant for public use without compensation. The prohibition against this wrong found in Article V and Section 1 of Article XIV of the amendments has no applicability to the case of a debt due the State. The State was not seeking to take any of the company's property except in payment of indebtedness to be found due after judicial investigation and trial. Such a taking would neither be for public use in the sense of the constitution, nor without compensation. The compensation was received in the grant of the franchise. We submit that that claim has no color of foundation.

The same thing is true of the charge which in part underlies assignments 2b, 2c and 2d that the State was proposing to take the property of the defendant without due process of law. The object of the complaint was to invoke due process of law. The filing of it was the beginning of due process of law. It was an invitation to the defendant

to come into court and show cause why the prayer of it should not be granted. It did not seek to take any property from the defendant unless at the end of due process of law it should be found that the company was justly indebted to the State. Surely that claim has no color of foundation.

Aside from the questions involved in the construction of the law of 1847, and in the details of the accounting, the only issues in the case which were decided against the contention of the defendant were those presented by the defenses of the defendant resting on the former judgment, laches, estoppel, and the act of the company in accepting the provisions of the general law. These were all affirmative defenses, resting on facts which occurred after the whole liability alleged in the complaint and found by the court had accrued. In finding that they were insufficient the court did not destroy any vested right to property in the defendant, nor take its property for public use without compensation, nor without due process of law; nor will any of those results attend or follow the enforcement of the judgment by execution. The judgment may be unjust. The Superior Court and the Supreme Court may have erred in their construction of the act of 1847, or in overruling the defenses presented by the defendant, but it will not follow that the constitutional rights of the plaintiff in error have been violated. The United States Constitution guarantees the citizen against wrong at the hands of the courts of his own State at a few fundamental

points only. For the remainder he has to take his chances at the hands of the State courts.

In order to authorize this court to review the proceedings of a State court it must appear not only that the party asking the review set up in the State court a claim of some right or immunity resting on the Constitution of the United States, or some law of Congress, or some treaty or grant made by the United States, and that the claim was overruled or denied by the State court, but that it was one having color of foundation. An empty claim—one manifestly and on its face without merit, does not call on this court to look into the proceedings of the State court.

The preceding enumeration of the claims made by the defendant in the State court, embracing the charge that the State was seeking to destroy the defendant's vested rights, take its property for public use without compensation, and without due process of law, and deny it the equal protection of the laws, and the action of the court in overruling the defenses of laches, estoppel, former judgment and the acceptance of the general law, are all the claims which were made by the defendant (except one, to be noticed in a moment) which had in them any suggestion that the defendant's rights under the Constitution of the United States were being invaded or threatened.

We submit that those claims as grounds for the interposition of this court, are all frivolous; that it wants only the statement of them, taken in connection with the facts which appear in the record, hereinbefore stated, to disclose their utter want of merit; and that they have, therefore,

no color of foundation. If so, they may be dismissed at once from the consideration of the court.

On this proposition the recent case of *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, is in point. The suit in the State court was a proceeding in the nature of a *quo warranto* brought by the Attorney-General of the State to obtain a forfeiture of the charter of the New Orleans Waterworks Company.

The charter of the company contained a provision that if the company should fail to comply with its terms in regard to the price of water the city should be entitled to proceed against it by mandamus. The suit was begun under authority of a joint resolution of the General Assembly referring the subject to the Attorney-General for such action as he should deem proper. The trial court found for the company, but the Supreme Court reversed that decision and entered a decree forfeiting the company's charter.

The case has a touch of resemblance to the one before the court in its facts. The waterworks company's charter provided that its net profits should not exceed ten per cent. per annum, and that the city council should have the right to fix prices at such rates that the profits should not exceed that amount. Instead of paying its surplus profits to the city or the State the company was to give the benefit to the public by keeping its rates down to such point as would prevent the existence of any surplus; as the legislature of Indiana had the power to require with respect to the tolls and freights of the Terre Haute and Indianapolis Railroad

under Section 23 of the act of 1847, after the stockholders had received from dividends the full sum invested and ten per cent. per annum thereon.

The plaintiff in error paraded the same formidable catalogue of violated constitutional guarantees which are relied upon here. It was claimed that, as the charter provided that the remedy by mandamus might be employed to compel the company to maintain lawful rates, the proceeding to forfeit the charter for the same cause was a breach of the contract, a deprivation of property without due process of law, and a denial of the equal protection of the laws.

It was claimed also that the joint resolution referring the subject matter to the Attorney-General for such action as he might deem proper was a statute impairing the obligation of the charter contract, divesting vested right, and denying to the company the equal protection of the laws.

And more of the same sort.

In entering upon the consideration of the case the court, in the opinion by Peckham, Justice, laid down the following general rule:

> "It has long been the holding of this court that in order to warrant the exercise of jurisdiction over the judgments of State courts that there must be something more than a mere claim that a federal question exists. There must, in addition to the simple setting up of the claim be some color therefor, or, in other words, the claim must be of such a character that its mere mention does not show it destitute of merit; there must be some fair ground

for asserting its existence, and, in the absence thereof, a writ of error will be dismissed, although the claim of a federal question was plainly set up."

After the citation and discussion of numerous cases the opinion proceeds on page 351:

"The answer to the first question, as to mandamus being the exclusive remedy for illegal rates, is that the State court has otherwise construed the charter, and has held that mandamus is not the only remedy, but that the company was liable to be proceeded against by *quo warranto* at the suit of the State through its Attorney-General. The claim that by so proceeding there is any impairment of the obligation of a contract by any subsequent legislation, or that there has thus been a deprivation of property without due process of the laws, or a denial of the equal protection of the laws, has no colorable foundation.

"An examination of this question, among others, was made by the State court after full hearing by all parties, and all that can possibly be claimed on the part of the plaintiff in error is that such court erroneously decided the law. That constitutes no federal question.

"As to the second question, there is no State statute subsequent in date to the charter of the water company under or by virtue of which this proceeding was commenced, or which in any way affects the contract of plaintiff in error. The joint resolution of the Legislature of Louisiana referred the whole matter to the Attorney-General for him to bring suit to forfeit the charter or to take such

action as he might think proper. It was a simple authority, if any were needed, to present the question to the court, and neither the contract nor any other rights of the parties were in anywise altered by such resolution. The proceeding herein is based solely upon an alleged violation of the terms of the charter by the corporation; that question has been judicially determined after a full investigation by the State courts, and in a proceeding to which the company was a party, and after a full hearing has been accorded it in such proceeding. This was due process of law, and no federal question arises from the decision of the court.

"The same answer would seem to fit the other questions submitted by the plaintiff in error. They are all based upon the proposition that the judicial determination of these particular questions by the State tribunal was erroneous, and on account of such error the rights of the plaintiff in error, under the Federal Constitution, have been violated. But mere error in deciding questions of this nature furnishes no ground of jurisdiction for this court to review the judgments of a State court."

And on page 353:

"Neither the legislative resolution, nor the action of the Attorney-General, nor that of the Supreme Court of the State, nor all combined, can, as contended for by plaintiff in error, be in anywise regarded as the taking by the State of property without due process of law through the instrumentality of its legislative, its executive and its judicial departments, either jointly or severally. When analyzed, the whole claim is reduced to the asser-

> tion that in enforcing a condition which is impliedly a part of the charter, the State, through the regular administration of the law by its courts of justice, has by such courts, erroneously construed its own laws. This court in such a case has no jurisdiction to review that determination."

It appears to us that this decision must be taken as controlling in respect to the claims of the plaintiff in error which we are now discussing. It was there a question of forfeiting a charter granted by the State on account of failure by the corporation to obey the law by which its franchises were conferred. It is here a question of compelling a corporation to perform a duty imposed upon it by the law by which its franchises were conferred. In both cases alike the charter had to be construed, the facts of the company's conduct ascertained, and the proper judgment awarded. In doing this the State courts in both cases alike had full jurisdiction of subject matter and parties. In both cases alike, if the result reached by the court was right there was nothing for the defendant to complain of. In that case the defendant's contention, when stripped of all pretense, was, that the State court erred in its decision. The same thing is true of this case. If the State court put the right construction on the law of 1847, and was right in disallowing the defenses of former adjudication, laches, estoppel, and the acceptance of the general law, what just ground of complaint can the plaintiff in error have to urge in this court, or anywhere else?

In the foregoing enumeration of claims made by the plaintiff in error of invasions of its constitutional rights

by the proceedings in this case, and in our argument to show that those claims are all without color of foundation, we expressly excepted one to be considered later. That was the claim that it had been injured by the legislation of 1897. We have already said all that need be said, we think, in regard to the acts of January 27 and March 4—the first and the last of the series—to show that no constitutional right of the plaintiff in error was affected by either of them.

The second of the series—the act of February 18, 1897—is the one which amended the section of the general railroad law authorizing railroad companies organized under special charters to accept the provisions of the general law. The only question to be considered here in regard to that statute is whether the State court in holding that the railroad company's acceptance of the general law in 1873 did not operate to release it from liability to the State already incurred under the act of 1847 was giving an effect to the section so amended which it would not and could not have given to the original section. If the company's acceptance of the general law in 1873 under the section as it then stood did not release it from its existing obligations to the State under its original charter, the amendment of the section did not hurt it, and it has no cause of complaint here on that ground. This particular question was not discussed in the opinion of the Supreme Court further than to say in general terms at the foot of page 673 of the record in this court that "The acceptance in 1873 of the general railroad law of 1852 had no effect

in relieving appellant from unperformed duties, assumed in its charter contract of 1847." This is in form a statement of the effect of the acceptance of the general law as that law stood in 1873. "The acceptance in 1873" * * * "had no effect"—that is, had none at the time. If we take in connection with this language the statement in the opinion on page 655 of the record in this court, that:

> "We pass, then, the legislation of 1897 as being out of the case, except as conferring certain powers upon the Attorney-General, and as defining the procedure, whereby the claims asserted by the State, as arising under the original charter, may be fully and fairly contested with the appellant,"

we are bound to construe the decision of the court to be that the company's acceptance of the general law as it stood at the time had no effect to release its existing liability to the State. These are both Indiana statutes—the act of 1847 and the general railroad law of 1852. The effect of the acceptance of the latter statute by a company created by the former is a mere question of construction of Indiana statutes; and upon which this court will not review the action of the Supreme Court of Indiana.

We may assume for the argument, however, that the plaintiff in error may claim that it does not clearly appear that the Supreme Court rested its decision that the company's liability to the State was not discharged by its acceptance of the general law wholly on the effect of such an acceptance under the original section, and that it is therefore at liberty to urge that that decision rested on the sec-

tion as amended by the act of February 18, 1897. We would then have a case in which the decision of the Supreme Court may be referred to either one or two statutes. In such a case this court will treat the decision of the State court as resting on that one of the two statutes which will support it without infraction of the constitutional rights of either party. Applying that principle, it will be the duty of this court to treat the decision of the Supreme Court as resting upon its construction of the act of 1847, and the general law of 1852, and not upon the amendment of 1897. Upon this point authorities will be referred to a little later.

This leaves for final consideration the act of February 24, 1897—the act which amended section 23 of the law of 1847. This act is set out in full on page 15, *ante*, and section 23 of the original law will be found on page 3. A careful reading of the amending act will show that it expresses substantially what the Supreme Court found to be the true construction of section 23 of the original law. That was its manifest intention—to express the will of the Legislature in respect to the construction of the law of 1847. No doubt such a legislative construction would be unavailing as against a different judicial construction; but in so far as it expresses the true judicial construction it is harmless—a mere re-enactment of the law, without change.

The more important point, however, is, that the Supreme Court expressly placed its decision on the law of 1847, as it was enacted originally, and expressly put aside

the act amending that law as not necessary to be considered. We have already quoted twice from the opinion the express statement of the court to this effect found on page 655 of the record of this court. We have, therefore, a decision of the State court based expressly upon a State statute to which no objection can be made; and we have another State statute which may be invalid upon the ground that it impairs the obligation of the contract embodied in the former statute, upon which the decision might have been based, but was not. It is as simple an illustration as can be found of the absence of a federal question.

The cases in this field are embarrassing in number. It seems to import a want of respect to the court to cite any of them. They are the court's own decisions, and largely of recent date. We can not help feeling that the statement which we have made of the contents of the record will be at once recognized as sufficient to bring the case within the class of those in which no jurisdiction exists here to review the action of the State court. It is only because it seems to us possible that we may abridge the labor of the court somewhat by bringing together a few of those cases which appear to us to be controlling that we ask attention to what follows.

In *Eustis* v. *Bolles*, 150 U. S. 361, Eustis, the plaintiff below, was a creditor of Bolles and Wilde, who filed a petition under the insolvent laws of Massachusetts. In the proceedings under that petition there was a composition as authorized by the statute, by which the insolvents were

discharged by payment of fifty cents on the dollar. Eustis opposed the composition and discharge on the ground that the composition statute, having been passed after the execution of his note, was a violation of that provision of the Constitution of the United States which forbids any State to pass a law impairing the obligation of contracts. But he accepted his money under the composition, being one-half of his claim. Subsequently he brought suit for the remainder of his claim. The defendant set up the discharge, and the plaintiff replied that the law was unconstitutional. The court held that he was estopped by his acceptance of his share under the composition. Eustis took a writ of error to this court. It was dismissed. The opinion, by Mr. Justice Shiras, embraced a comprehensive statement of the rules which obtain in such cases, from which we quote the following from pages 366-7:

> "It is settled law that, to give this court jurisdiction of a writ of error to a State court, it must appear affirmatively, not only that a federal question was presented for decision by the State court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. * * *"
>
> "It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not federal, also

has been raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the federal question, to sustain the judgment, this court will not review the judgment. * * *"

"Where it appears by the record that the judgment of the State court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws or treaties of the United States, or upon some other independent ground, and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the federal question, this court will not take jurisdiction of the case, even though it might think the position of the State court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the State court based its judgment on the law raising the federal question, and this court will then take jurisdiction. * * *"

"Where, in an action pending in a State court, two grounds of defense are interposed, each broad enough to defeat a recovery, and only one of them involves a federal question, and judgment passes for the defendant, the record must show, in order to justify a writ of error from this court, that the judgment was rested upon the disposition of the federal question; and if this does not affirmatively

appear, the writ of error will be dismissed, unless the defense which does not involve a federal question is so palpably unfounded that it can not be presumed to have been entertained by the State court."

And further, on pages 368-9:

"The record, however, further discloses that William T. Eustis, represented in this court by his executors, had accepted and receipted for the money which had been awarded him, as his portion, under the insolvency proceedings, and that the court below, conceding that his cause of action could not be taken away from him, without his consent, by proceedings under statutes of insolvency passed subsequently to the vesting of his rights, held that the action of Eustis, in so accepting and receipting for his dividend in the insolvency proceedings, was a waiver of his right to object to the validity of the insolvency statutes, and that, accordingly, the defendants were entitled to the judgment.

"The view of the court was that, when the composition was confirmed, Eustis was put to his election whether he would avail himself of the composition offer, or would reject it and rely upon his right to enforce his debt against his debtors notwithstanding their discharge.

"In its discussion of this question the court below cited and claimed to follow the decision of this court in the case of *Clay* v. *Smith*, 3 Pet. 411, where it was held that the plaintiff, proving his debt and taking a dividend under the bankrupt laws of Louisiana, waived his right to object that the law did not constitutionally apply to his debt,

> he being a creditor residing in another State. But in deciding that it was competent for Eustis to waive his legal rights, and that accepting his dividend under the insolvency proceedings was such a waiver, the court below did not decide a federal question. Whether that view of the case was sound or not, it is not for us to inquire. It was broad enough, in itself, to support the final judgment, without reference to the federal question."

In *Bacon* v. *Texas*, 163 U. S. 207, the suit was by the State of Texas to recover 300,000 acres of land which, it was alleged, was unlawfully held by the defendants, Bacon and others. It appears in the case that the State of Texas, by act passed July 14, 1879, offered the lands in dispute and other lands for sale upon certain conditions; that the defendants claimed that they had purchased the lands in compliance with the terms of the act; that afterward, in 1883, the State passed a law repealing the act of 1879, which law, as the defendants claimed, was void because it operated to impair the obligation of their contract with the State under the prior law. The State relied, as ground of recovery, upon the claim that the defendants had not complied with the terms of the law of 1879, and so had not made a valid purchase under that law; and this claim was sustained by the State court. The writ of error to this court was dismissed. The following extracts from the opinion by Mr. Justice Peckham exhibit clearly the ground of the decision. First from page 216:

> "Where the federal question upon which the jurisdiction of the court is based grows out of an

illegal impairment of the obligation of a contract, it is now definitely settled that the contract can be impaired within the meaning of this clause in the Constitution, and so as to give this court jurisdiction on writ of error to a State court, by some subsequent statute of the State which has been upheld or effect given it by the State court. * * *"

"If the judgment of the State court gives no effect to the subsequent law of the State, and the State court decides the case upon grounds independent of the law, a case is not made for a review by this court upon any ground of the impairment of the contract."

And on page 219:

"The case is not altered by the fact that the State has passed an act which the defendants assert impairs the obligation of their contract, so long as the court, in deciding their case, holds that they never had a contract, because they never had complied with the provisions of the original statute, and so long as it gives judgment wholly without reference to the subsequent act, and without upholding or in any manner giving effect to any provision thereof.

"Whether the statute of 1879 permitted a survey to be adopted from a survey which had previously been made in the field, or whether it did not, was a case of construction of a State statute by the State court. It is not one of those cases where this court will construe the meaning of a state statute for itself. This court, even on writ of error to a State court, will construe for itself the meaning of a statute as affecting an alleged contract where it is

claimed that a subsequent statute passed by the State has impaired the obligations of the contract as claimed by the party, and where such subsequent statute has by the judgment of the State court in some way been brought into play and effect been given to some or all of its provisions. In such a case this court construes the contract in order to determine whether the later statute impairs its obligation. *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683, 697. This is not such a case. The later statute is not given effect to by the judgment of the court.

"The State of Texas by the act of 1883 withdrew its public lands from sale. The prior act of 1879 had offered them for sale. Whether the act of 1883 withdrew them or not could have no bearing upon the question whether these defendants had complied with the act of 1879 in relation to having the surveys made of the lands which they applied to purchase. If the lands had not been withdrawn, the parties' rights in them would depend upon whether they had been surveyed, and if they had not, they had no right to them. Whether they had or had not complied with the act of 1879 was not a federal question. If the court had decided that the survey actually made was a sufficient compliance with the act, but that the defendants obtained no vested rights in the land by virtue of such survey, and that the act of 1883 was effectual in withdrawing such lands from market, that decision would have been reviewable here, and in that case this court would determine for itself what rights the parties obtained under the act of 1879, and whether by what they had done they had ob-

tained any rights which could not be unfavorably affected by the act of 1883."

There was also a question in the case which involved, to some extent, the effect of the law of 1883. The facts and the judgment of the court upon them appear fully in the following quotation from the opinion—pages 226-7:

> "We have thus far treated this case as if the sole question arising in it were not of a Federal nature. It will be seen, however, that certain tenders were made to the treasurer of the State of Texas in payment for lands claimed by the defendants to have been purchased by them, and some of those tenders were held by the trial court to have been insufficient, because they included tenders of payment for some lands where the surveys had been made after the passage of the act of 1883 repealing the act of 1879, as well as for surveys made before that time, and the defendants did not separate or offer to separate in their tenders the surveys made before the repeal from those made after, and there was consequently, as the trial court held, no legal tender for any of the surveys, and upon these facts the court founded a conclusion of law (No. 4), which is as follows: 'Bacon and Graves have never paid or offered to pay, for said land until long after the expiration of the time allowed and required by law. The purported surveys of many of the sections of the land for which they tendered payment on May 19, 1883, were made after the fifty per cent. act was repealed, and Bacon and Graves did not separate or offer to separate in their tender the surveys made before the repeal from those made

after, and there was consequently no legal tender.' That was one of the five different grounds upon which the trial court held that the defendants had not complied with the law and were not entitled to purchase the lands in question. This particular finding is in no way dependent upon the others, and they are all entirely separate and distinct from one another. The finding No. 2, that 'they did not comply with the law by having the lands surveyed, as was required by law, and therefore could not purchase it,' is a distinct and separate ground for the judgment of the court to rest upon to the same extent, as if none other had been stated, and it is entirely sufficient in itself upon which to rest the judgment.

"If the fourth finding, above set forth, had alone been made by the court below, this court, upon writ of error, would have had jurisdiction to review the whole question, because by that finding some effect is given to the subsequent act of the legislature which, it is claimed, impaired the obligation of defendants' alleged contract with the State; but where there are two grounds for the judgment of the State court, one only of which involves a federal question, and the other is broad enough to maintain the judgment sought to be reviewed, it is now settled that this court will not look into the federal question, inasmuch as there is another ground upon which the judgment can rest, and it will dismiss the writ for that reason."

In *Seneca Nation* v. *Christy*, 162 U. S. 283, the defendants came into possession of some land which in 1826, under the Indian Intercourse Act of 1802, had been con-

veyed by deed by the Seneca Nation to T. O. & R. The deed was not ratified by the Senate of the United States or proclaimed by the President, as provided by act of congress. The nation was authorized by act of 1845 to sue to protect its reservations, and pursuant to this act it brought this action in ejectment in 1885. Defendant pleaded the validity of the grant and the statute of limitations. The Court of Appeals, affirming the judgment below, held that the transaction was valid and not in contravention of the provisions of the Federal Constitution or of the Indian Intercourse act of 1802, and that even if invalid the statute of limitations was a bar to the action.

The Supreme Court dismissed the writ for the reason that the State court rested its decision, among other grounds, upon the enabling act of 1845, and it said:

> "As it appears that the decision of the Court of Appeals was rested, in addition to other grounds, upon a distinct and independent ground, not involving any federal question, and sufficient in itself to maintain the judgment, the writ of error falls within the well settled rule on the subject and can not be maintained."

In *Henderson Bridge Co.* v. *Henderson City,* 141 U. S. 679, the city of Henderson sued to recover taxes claimed by the city against the company on account of its bridge across the Ohio river. The city assessed the bridge for taxation to the low water mark on the Indiana side of the river, the act incorporating the city having so fixed its boundary. Defendant claimed that the bridge was over the water of the Ohio river, which was a naviga-

ble stream, under the jurisdiction of the United States, and that the taxing of such property violated the Constitution of the United States. The Court of Appeals held that the company had voluntarily, by accepting the ordinance by which it obtained the right to occupy the street in Henderson and the land on that side of the river to low water mark, agreed that the whole bridge should be taxed.

The Supreme Court held that the judgment of the State court was based wholly upon the company's acceptance of the ordinance, and that the case involved no federal question. We quote as follows from the opinion of Mr. Justice Blatchford, pages 688-9:

> "Although a federal question may have been raised in the State court, yet if the case was decided in that court on grounds not involving a federal question, but broad enough to sustain the decision, this court will refuse to entertain jurisdiction. *Kreiger* v. *Shelby Railroad Co.*, 125 U. S. 39, 46; *De Saussure* v. *Gaillard*, 127 U. S. 216, 234; *Hale* v. *Akers*, 132 U. S. 554, 564, 565; *Hopkins* v. *McLure*, 133 U. S. 380, 386, 387; *Johnson* v. *Risk*, 137 U. S. 300, 306, 307.
>
> "The opinion of the State court is based wholly upon the ground that the proper interpretation of the ordinance of February, 1882, was that the bridge company voluntarily agreed that the bridge should be liable to taxation. This does not involve a federal question, and is broad enough to dispose of the case, without reference to any Federal question. This court can not review the construction which was given to the ordinance as a contract, by the State court."

This is a stronger case in its facts than the present one. It was an extraordinary assumption of power on the part of the Legislature of Kentucky to extend the taxing limits of the city of Henderson to the Indiana shore. If the law was void it would seem to be a nice question whether the bridge company could give it any effect by agreement with the city. Suppose the bridge had been part of a railroad extending from Henderson to Indianapolis. Could the company have made a valid agreement that the whole railroad should be taxed by the city of Henderson? But this court would not look into that question. It accepted the decision of the Kentucky court without the slightest question. In the present case the Indiana court construed the law of 1847 and based its judgment for the plaintiff wholly upon that law. In the Kentucky case, if the judgment of the State court as to the effect of the bridge company's acceptance of the terms of the ordinance was correct, the company had nothing to complain of. In this case, if the Supreme Court's construction of the law of 1847 was correct, the plaintiff in error has nothing to complain of.

In *Hopkins* v. *McLure*, 133 U. S. 380, the suit in the State court was by McLure, as administrator, to subject lands to sale and marshal the assets. The estate was insolvent. Hopkins was a creditor who held a mortgage which had been foreclosed by a decree upon which the mortgaged property had been sold, leaving an unsatisfied balance. The question was, whether as to that balance he was a preferred creditor in the class of mortgagees, or belonged in the class to which the claim secured would be-

long if there had been no mortgage. The State court held that he belonged to the latter class.

The question was curiously complicated by some contradiction among the prior decisions upon the subject in the Supreme Court of the State—South Carolina. A statute passed in 1789 prescribed the order in which the debts of a decedent should be paid. The statute was construed in 1822 and again in 1846 to mean that the balance unsatisfied after the sale of mortgaged premises on foreclosure was a simple contract debt of the grade to which the instrument secured by the mortgage belonged. In 1875 these decisions were overruled by *Edwards* v. *Sanders*, in the Supreme Court of the State, and it was held that the unsatisfied balance was still a mortgage debt under the statute. In 1885 *Edwards* v. *Sanders* was overruled by *Piester* v. *Piester* and the old construction re-established. In 1878 the Legislature passed an act amending the former statute so as to provide expressly that in the settlement of decedents' estates a mortgage should not be entitled to priority except as to the particular part of the estate covered by the lien.

The plaintiff in error in this court, Hopkins, claimed that as his debt was contracted in 1876, while the decision in *Edwards* v. *Sanders* was the declared law, the amending act of 1878, operated to impair the validity of his contract. The following extract from the opinion by Mr. Justice Blatchford, page 386, shows the ground upon which this contention was overruled:

"It is contended on the part of the plaintiffs in error that the decision of the court below was based upon the application of the act of 1878 as a valid act, affecting the contract of the plaintiffs in error and impairing its obligation. But the validity of that statute was not drawn in question, and the Supreme Court did not pass upon it. The decree of that court does not rest upon that statute, but upon independent grounds. The decision rests upon a ground broad enough to cover the entire case, without considering the statute. It rests upon the ground that the law of South Carolina, under the act of 1789, was such as it had always been held to be, in *Tunno* v. *Happoldt, Kinard* v. *Young,* and *Piester* v. *Piester,* and that the law as so declared had always been the law, and was not varied or changed by anything decided in *Edwards* v. *Sanders.* That being so, we must hold that no Federal question is presented by the record.

"This view is in accordance with the decisions of this court in *Kreiger* v. *Shelby Railroad Co.,* 125 U. S. 39; *DeSaussure* v. *Gaillard,* 127 U. S. 216; *Hale* v. *Akers,* 132 U. S. 554, the ruling in which cases is, that where the Supreme Court of a State decides a Federal question, in rendering a judgment, and also decides against the plaintiff in error on an independent ground, not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question."

We have pointed out that the act of February 24, 1897, amending Section 23 of the law of 1847, expressed in sub-

stance that which the Supreme Court of Indiana declared in this case to be the true construction of the original section. The South Carolina act of 1878 expressed that which the Supreme Court of that State declared was the prior law under the construction given to the law of 1789. It was entirely true to say that the State court in the case just cited gave effect to the rule laid down in the amending act of 1878. But it was not a new rule.

In the present case it may be that the Supreme Court gave effect to the principles and rules stated in the act of February 24, 1897. But they were also the principles and rules of the original section. They were nothing new.

In *Kreiger* v. *Shelby Railroad Co.*, 125 U. S. 39, the question was whether or no the Shelby Railroad District had a right to vote at stockholders' meetings upon stock held by it in the Shelby Railroad Company. The company was organized in Kentucky by act of the Legislature of March 15, 1851, its stock was to be subscribed for by any individual or corporation, and at each stockholders' meeting "each stockholder was to be allowed one vote for each share owned by him, her or it." Shelby County was authorized to subscribe for stock in behalf of the county, to be paid for by agreement between it and the commissioners or directors taking the subscriptions; the purchase funds to be obtained by levy on all taxable property in the county. On February 3, 1869, an act amending the charter was passed authorizing a certain defined portion of the county to subscribe for any amount of the stock not exceeding $300,000, the subscription to be first voted upon

by the legal voters of that portion of the county, bonds to be issued and given to the railroad company to pay for the same, and a tax levied on the property in that portion of the county not to exceed 1 per cent. in one year. By an act of March 11, 1870, a further amendment was made that that part of the county was then to have power to vote at the stockholders' meetings by certain officers mentioned. By an act of February 26, 1873, the same part of Shelby County was given the corporate name of Shelby Railroad District of Shelby County.

The District, pursuant to the act of 1869, subscribed for stock, issued its bonds and levied the tax, and had always voted its stock prior to the institution of these suits. Kreiger was a tax payer and also bought some stock. Plaintiffs in error contended that the statutes of 1851 and 1869 created a contract by which the stockholders of the company were those persons who had become so by subscribing for stock or by the payment of taxes, and the right to vote upon stock subscribed for by counties or other municipal subdivisions was in tax payers only; and that the statutes of 1870 and 1873 first granted to the District the right to vote as a stockholder in the company, and thereby impaired the obligation of the contract created by the earlier statutes. The State court construed the act of 1851 as amended by the act of 1869, and held that the legal effect of the act of 1869 was to make the District a corporation and entitle it to vote and receive dividends upon the stock of the company. It held further that the acts of 1870 and 1873 did no more than to make that cer-

tain which was before uncertain or had been omitted from the original act.

The Supreme Court dismissed the writ. We quote the following from the opinion by Mr. Justice Gray, on page 46:

> "It thus appears that the State court, upon full consideration, decided that the acts of 1870 and 1873 conferred no new rights, but only defined more clearly the manner in which the rights conferred by the earlier statutes should be exercised; and that it based its judgment entirely upon the construction and effect of the earlier statutes, and upon grounds which would have been equally controlling if the later acts had not been passed. The necessary conclusion is that this court has no jurisdiction to review those judgments. *Bank of West Tennessee* v. *Citizens' Bank of Louisiana,* 13 Wall. 432; S. C. 14 Wall. 9; *Palmer* v. *Marston,* 14 Wall. 10; *Kennebec Railroad* v. *Portland Railroad,* 14 Wall. 23; *Stevenson* v. *Williams,* 19 Wall. 572; *New Orleans Waterworks* v. *Louisiana Sugar Refining Co., ante,* 18."

In *Adams County* v. *Burlington & Missouri Railroad Co.*, 112 U. S. 123, the county brought its action against defendant company to quiet its title in certain lands. The county asserted title under the swamp land act of 1850 and the railroad company under the Iowa land grant act of May 15, 1856. The county contended that the lands in question were selected as swamp lands by the county surveyor under the authority of the Secretary of the Interior and Commissioner of the Land Office, as well as the

Governor and Legislature of Iowa; that the report thereof to the Commissioner of the Land Office was made in 1854, and that, therefore, the right of the State to a patent for the said lands was perfected by the act of March 3, 1857. The railroad company contended that in 1861 the claim of the county to these lands was submitted to the said Commissioner for final adjudication; that defendant appeared and contested the claim; that the Commissioner decided the county's claim to be fraudulent and unfounded, and on October 25, 1862, the said Commissioner conveyed the said lands to the State of Iowa for railroad purposes, pursuant to the act of Congress of May 15, 1856, which lands the State conveyed to defendant; and that plaintiff since 1861 voluntarily abandoned all claim to the said lands, recognized defendant's title to the same and had regularly taxed same as defendant's property. The State court held that defendant was the legal owner of the land and that plaintiff by its acts and conduct was estopped from claiming the same or denying defendant's title thereto. Plaintiff was allowed a writ of error to the Supreme Court. The Supreme Court dismissed the writ and stated that two questions were presented by the pleadings: One, whether the county acquired a title in equity to the lands in dispute under the operation of the swamp land act, supplemented, as it was, by the act of March 3, 1857; and, two, whether, if it did, it was estopped by its subsequent acts from setting up that title as against defendant. It held that the decision of the State court rested on the second question, which was clearly non-federal, and, in referring to that decision, the court, by Mr. Chief Justice Waite, said:

"This brings us to the inquiry whether it appears sufficiently that the case was disposed of below on this defense. If it does, the motion to dismiss must be granted, and having no jurisdiction, we can not pass on the correctness of that decision.

"The record discloses that this separate and distinct defense was made, and that it in no way depended on the validity or invalidity of the original title of the county. In our opinion it is clearly to be inferred from the decree of the court of original jurisdiction, which was affirmed in the Supreme Court, that the decision in favor of the company was placed entirely on that ground. So far as the original bill of the county is concerned, the decree finds in favor of the company and dismisses the bill. Then, as to the crossbill, it finds the legal title to be in the company, and that the county is estopped from claiming the lands or denying the company's title thereto. This, of itself, implies that there was, in fact, no decision against any right, title, privilege or immunity claimed under the Constitution or laws of the United States, and that the decree rested alone on the defense of estoppel which was broad enough to control the rights of the parties without disposing of the Federal question which it was attempted to raise. In other words, it was adjudged by the State court that the title of the company must prevail in this suit because the county was precluded by its conduct from insisting to the contrary."

In *McManus* v. *O'Sullivan,* 91 U. S. 578, plaintiff claimed title to certain property which T. M. had entered in 1854 and held possession of until 1861, when he died.

Defendants entered the premises when T. M. died and held adversely to his estate until 1867, when this suit was filed. The City of San Francisco during T. M.'s possession claimed title to the land under a Mexican pueblo right, and the Circuit Court of the United States in 1865 decreed the land in favor of the city. In 1866 an act was passed to quiet title to certain lands in San Francisco. The questions presented to the State court were whether possession necessarily connects itself with the true title in the absence of proof to the contrary, and whether possession within the meaning of the statute of limitation in California is adverse to one who claims title, if it is not adverse to all the world.

The State court decided that possession did not carry with it the presumption that plaintiff held under the city title, and that if the possession of the defendants was adverse to him it was a bar to his right of action, even though it was not adverse to all the world.

The Supreme Court dismissed the writ and held that these questions were within the exclusive jurisdiction of the State courts, saying, by Mr. Chief Justice Waite:

> "Their decision against the plaintiff made it unnecessary to consider the proposed federal question. Thus it is seen that the federal question was, in fact, not decided; and that in the view the court below took of the case such a decision was not necessary."

It can hardly be necessary to burden this court with the citation of further authorities, but for the purpose of

showing that this court has taken no backward step and that the principle has been adhered to by an unbroken current of decisions we cite in addition the following:

Blount v. *Walker*, 134 U. S. 607, at 614.
Beatty v. *Benton*, 135 U. S. 244, at 254.
Hammond v. *Johnston*, 142 id. 73.
Delaware etc., Co. v. *Reybold*, 142 id. 637, at 643.
O'Neil v. *Vermont*, 144 id. 323, at 336.
Miller's Exe'tr v. *Swann*, 150 id. 132.
California, etc., Works v. *Dairy*, 151 id. 389, at 393.
Snell v. *Chicago*, 152 id. 191, at 196.
Rutland, etc., Co. v. *Central Vt., etc., Co.*, 159, id. 631, at 641.
Mo. Pac. Ry. Co. v. *Fitzgerald*, 160 id. 556, at 576.
Dibble v. *Billingham, etc., Co.*, 163 id. 63, at 69.
Un. Nat'l Bk. v. *Louisville, etc., Co.*, 163 id. 325, at 331.
Harrison v. *Morton*, 171 id. 38, at 47.
Pierce v. *Somerset Ry.*, 171 id. 641, at 650.
Chappel, etc., Co. v. *Sulphur, etc., Co.*, 172 id. 465, at 471.
McQuade v. *Trenton*, 172 id. 636, at 640.
White v. *Leroy*, 174 id. 91, at 96.
Seeberger v. *McCormick*, 175 id. 274, at 280.
Moran v. *Horsky*, 178 id. 205.
Hale v. *Lewis*, 181 id. 473.

Indeed, in the more recent volumes the cases depending on the principle have been disposed of on a *per curiam*,

this court deeming the question no longer entitled to discussion or opinion.

Citing cases in this field is like gathering apples in a fruitful orchard—one is never ready to stop. Certainly we have burdened the court with enough of them if we understand aright their meaning and their application to the questions presented by this motion. It must be admitted that the act of 1847 imposed upon the railroad company a duty to pay surplus profits to the State in some amount in some contingency. No one ever denied that. The question was: In what amount and in what contingency? Counsel for the company contended, first, that the obligation to pay anything would not arise under the statute until the Legislature had exercised its power to regulate tolls and freights. That was the contingency. They contended further that the act proceeded upon the assumption that the Legislature, in exercising that power, would prescribe such rates that the payment of dividends at 15 per cent. would absorb the net profits as closely as possible. But it would be beyond the wisdom of the Legislature to accomplish that object perfectly—to anticipate the business of the road so accurately that a tariff of rates could be framed that would yield net profits exactly sufficient to pay dividends at 15 per cent. In order to be sure to have enough profits for that purpose it would be impossible to avoid having some surplus. This was all that was to go to the State. That was the amount. The school fund was to be used as a slop jar for the reception of such driblets of surplus revenue as would accrue in spite of the

efforts of the Legislature to prevent it. That was the theory of counsel for the defendant.

The theory of counsel for the State was that the statute was, first, a prohibition against the retention by the company of more than 15 per cent. per annum upon its capital stock out of its profits after the stockholders had received in dividends the full sum invested by them, with 10 per cent. per annum thereon; and, second, a requirement that the company should pay all its net profits after the payment of dividends at the prescribed rate, to the Treasurer of State, for the use of common schools, whether much or little, and whether the rates were regulated by law or not.

Upon such a construction of the statute the Legislature would be at liberty to adopt either one of two policies—either to fix the tolls and freights at the lowest standard that would produce 15 per cent. dividends, and so give the patrons of the road the advantage of low rates; or to fix them at such higher rate as the business would bear and give the resulting larger profits to the school fund. That was the great question in the case. This court will not review the State court's decision of it. A construction of the powers of the Supreme Court of the United States which would permit such review would totally destroy the independence of the State courts, and of the State governments.

This is only a sample of the questions that were presented in the case. It would serve no useful purpose to enter upon the others even in such mere statement as this. To follow them out in detail would show that by the time

the court disposed of the controverted questions respecting the construction of the statute of 1847, the right of the State to an accounting, and the principles upon which the accounting must be conducted were completely established without the slightest reference to any subsequent legislation or other ground of liability.

There remained then only the affirmative defenses tendered by the defendant—the former adjudication, laches, estoppel, and the acceptance of the general law. These were all either questions of Indiana State law and practice, or general law and practice; and this court will no more review the decision of the State court upon them than upon a pure question of statutory construction.

It appears to us that the cases which we have cited cover the whole ground of debate on this motion, both in the parallelism of the issues and questions presented and decided, and the pertinence, clearness and force of the principles enunciated so completely as to leave no respectable standing ground for opposition to our contention that the writ of error ought to be dismissed.

Respectfully submitted,

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